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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 407

SIDNEY KROSS,

Petitioner,

vs.

THE STATE OF CALIFORNIA,

Respondent.

PETITION FOR REHEARING

IRVING I. ERDHEIM,
Counsel for Petitioner.

ROBERT F. ARMSTRONG,
EDWARD M. CHAPIAN,
(*on the Brief*).

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Preliminary Statement

On December 22, 1952, this Court, by its order dated on that day, denied the petition herein for a writ of certiorari to the Superior Court of Los Angeles County, State of California.

Pursuant to Rule 33 of the Rules of this Court, the petitioner now applies for a re-hearing of his petition for a writ of certiorari based on other substantial grounds available to petitioner, although not previously presented.

POINT I

The refusal of the Trial Court to allow petitioner's expert, prior to trial, to fully examine the prosecution's exhibits consisting of fur hair contained in vials, impeded petitioner's preparation for trial and deprived him of a right guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The fur pieces which petitioner was convicted of having stolen were never produced and the only evidence presented by the prosecution to directly connect petitioner with the missing fur pieces were some fur hairs, allegedly taken from the trousers of the petitioner at the time of his apprehension. These fur hairs were placed in glass vials and were the basis of testimony by a police chemist and a complaining witness who in substance stated that they closely resembled mink hair (fol. 992).

The prosecution was unable to produce anyone who saw petitioner take the furs in question and they were not found in the possession of the petitioner (fol. 993). There was no evidence that the fur hairs on petitioner's trousers were from the missing fur pieces in the establishments petitioner allegedly burglarized.

Petitioner's trial attorney specifically requested the permission of the Trial Court to allow a competent expert to remove the fur hairs from the glass vials in which they had been placed and to mount them for the purpose of examination as had been done by the prosecution's expert. The Trial Court granted limited permission to petitioner's expert to examine the contents of the vials microscopically and to inspect the prosecution's slides, but refused to allow petitioner's expert to mount the hairs contained in the vials, such as was done by the prosecution (fol. 326).

Petitioner now makes the point that since permission was given to his expert to examine the hair contained in the vials the Trial Court should not have limited him, because by so doing the petitioner was not given a fair and reasonable opportunity to prepare his defense with regard to the most important tangible evidence in the case upon which petitioner was convicted. The prosecution would not have been compelled to disclose its case by the Trial Court permitting a thorough examination of the evidence in question, because as was previously stated, the Trial Court in effect acceded to the request for an examination of the evidence, but limited the extent of the said examination and thus hampered the preparation of petitioner's defense.

From the foregoing it is readily apparent that the prosecution's expert who testified at the trial as to the identity of the hairs in question, had a distinct advantage in being able to mount the hairs on slides, a right which was denied to petitioner's expert. It is now contended that by limiting this right to the petitioner, he was thus deprived of a right guaranteed by the Fourteenth Amendment to the United States Constitution, that is, denial of due process of law.

Under Federal practice a Rule of Court requires the prosecution to permit the examination of all physical evidence prior to trial. Federal Rules of Criminal Procedure, Rule 16.

This Rule is based upon the necessity of giving a defendant in a criminal case a reasonable opportunity to adequately prepare his defense. The Courts have lately demonstrated a more liberal attitude in allowing defendants the right to examine evidence which will be presented by the prosecution in criminal actions. This is only fair and equitable under our system of justice.

The original basis for the petition for a writ of certiorari to the Superior Court of Los Angeles County, State of California, was predicated upon the fact that petitioner was denied a fair trial as guaranteed by the Fourteenth Amendment to the Constitution of the United States by reason of the Trial Court's error in failing to grant a mistrial and in failing to grant a motion for a new trial where cameramen, photographers and reporters barged into the courtroom and made highly prejudicial comments to the petitioner herein in the presence and hearing of at least four jurors trying the case.

The Trial Judge at first indicated that he would grant a motion for a new trial and stated that the incident was regrettable. However, he apparently changed his mind and denied the motion for a new trial. The fact that there was a lingering doubt in the mind of the Trial Justice and the doubt expressed by two of the dissenting Justices of the Supreme Court of the State of California indicates that there is and was a very close question as to whether the petitioner was accorded a fair trial in compliance with the Fourteenth Amendment to the United States Constitution.

It cannot be denied that petitioner was convicted on weak circumstantial evidence and in connection therewith a reconsideration of the prejudicial influences that were had upon the jury by virtue of the Trial Court's failure to adequately protect the rights of the petitioner, must certainly point to a deprivation of petitioner's rights without due process of law as accorded to him by the Fourteenth Amendment of the Constitution of the United States.

The materiality of the Trial Court's error in failing to grant a mistrial or new trial are fully shown in petitioner's brief supporting the petition for a writ of certiorari heretofore filed with this Court. The limitation imposed by the Trial Court on the examination of the prosecution's ex-

hibits by petitioner's expert impeded and hindered the defense of the case in which petitioner was convicted on extremely weak circumstantial evidence.

CONCLUSION

Petitioner, therefore, respectfully urges the granting of a re-hearing, the vacating of the order denying certiorari, and, upon such re-hearing, the granting to the petitioner of a writ of certiorari directed to the Superior Court of Los Angeles County, State of California.

Respectfully submitted,

IRVING I. ERDHEIM,
Attorney for Petitioner.

I, IRVING I. ERDHEIM, attorney for the petitioner above named, do hereby state and certify, pursuant to Rule 33 of the Revised Rules of the Supreme Court of the United States, that the foregoing petition for re-hearing is presented in good faith and not for any purpose of delay, and I further certify that the said petition is restricted to the grounds specified in said Rule 33 as amended.

IRVING I. ERDHEIM,
Attorney for Petitioner.

January 2, 1953.